NO. 82619-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Personal Restraint Petition of:

SHAWN FRANCIS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

COURT OF APPEALS NO. 37489-7-II
PIERCE COUNTY SUPERIOR COURT NO. 00-1-03253-8

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A. STATEMENT OF THE CASE

Shawn Francis is currently serving a 347 month (29 year) sentence in the custody of the Washington Department of Corrections after pleading guilty in Pierce County Superior Court to one count of felony murder in the first degree, one count of assault in the second degree, and one count of attempted robbery in the first degree. Francis has been in custody on this matter for over 13 years. His projected release date is January 7, 2021.

The three charges arose from a single, senseless episode which occurred on November 4, 1995. Francis had just turned 18. That night he and another young man named Quinn Spaulding attacked Jason Lucas and D'Ann Jacobsen (whom they knew) with the intent to rob them of $2,000. Francis and Spaulding never did obtain any money, but Francis struck Lucas and Jacobsen with a bat during the attempted robbery. Jacobsen was not seriously hurt, but Lucas died four days later from injuries sustained in the attack.

Although Francis did not intend to kill Jason Lucas, his actions in the course of committing the crime of attempted first degree robbery caused Lucas's death. Ultimately, Francis pled guilty to one count of felony murder in the first degree (with the attempted commission of robbery in the first degree as the predicate felony), one count of assault in the second degree

against D'Ann Jacobsen, and one count of attempted robbery in the first degree against D'Ann Jacobsen.[1] In his plea statement, Francis admitted the following conduct:

> In Pierce County WA on Nov. 4, 1995 I struck Jason Lucas with a bat while attempting to rob Jason. When he didn't fall down, I struck him again. D'Ann Jacobsen was with him and when she screamed I swung the bat at her and hit her causing her substantial injury. I acknowledge my actions constitute a substantial step toward robbing her and Jason. Quinn Spaulding convinced me to drive him out to Jason's so that he could rob him of the money Jason and D'Ann had recently gotten from her parents. When Jason came home, Quinn threatened to kill me if I didn't attack Jason. I know that Jason died as a result of my striking him. I am very sorry for what I did and wish I would have confronted Quinn instead.

On February 27, 2008, Francis filed this personal restraint petition (PRP) in Division Two of the Court of Appeals. Francis summarized his claims as follows:

> Based on this single criminal episode, Shawn Francis pled guilty to and was punished for two other felonies in addition to the crime of first degree felony murder. As discussed in detail below, those two convictions—for second degree assault and attempted first degree robbery—violate state and federal constitutional protections against double jeopardy and cannot stand. Specifically, the crime of second degree assault against D'Ann Jacobsen (count II) constitutes the same offense for double jeopardy purposes as attempted first degree robbery (count III). *See State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). In addition, although both Lucas and Jacobsen were attacked during the incident, under well-established double jeopardy jurisprudence only a single attempted robbery occurred. *See State v.*

[1] Co-defendant Quinn Spaulding was allowed to plead guilty to one count of rendering criminal assistance in the first degree. He was sentenced to six months in jail.

> *Tvedt,* 153 Wn.2d 705, 107 P.3d 728 (2005). Finally, because that single attempted robbery was also an element of the crime of first degree felony murder, count III merges with count I and cannot be punished separately. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).
>
> Mr. Francis is entitled to relief from the judgment entered in this case. This Court should vacate the entire plea agreement and remand for further proceedings. Alternatively, the Court should vacate the convictions in counts II and III and remand for resentencing on count I.

PRP and Opening Brief, at 9-10.

The State filed a response to the PRP, and Francis filed a reply brief. On December 17, 2008, the Acting Chief Judge of Division II entered a one page dismissal order concluding that "by pleading guilty to reduced charges, Francis waived his right to claim double jeopardy." The order did not reach the merits of Francis' double jeopardy claims. The only authority cited by the Acting Chief Judge was Division Two's own decision in *State v. Amos*, 147 Wash. App. 217, 195 P.3d 564 (2008). The *Amos* decision was issued on October 21, 2008, after the parties had completed their briefing on the PRP. Notably, the State had not submitted the *Amos* decision to the court as supplemental authority, and the Acting Chief Judge did not provide the parties the opportunity to submit additional briefing to address Division Two's unique interpretation of double jeopardy in *Amos*.

Francis sought discretionary review in this Court, which was granted by a panel of five justices on July 8, 2009. Francis now asks the Court to reverse the Court of Appeals and to grant his PRP.

B. ARGUMENT

A Plea of Guilty Does Not Waive the Protections of the Double Jeopardy Clause When the Violation is Apparent From the Record Without the Need for Additional Fact-finding.

In dismissing Francis' PRP without reaching the merits, the Acting Chief Judge of Division Two relied on one case: *State v. Amos*, 147 Wash. App. 217, 195 P.3d 564 (2008). *Amos* holds that a defendant waives his right to the double jeopardy clause's protection against multiple punishments whenever he enters a guilty plea pursuant to a plea bargain. *Amos*, 147 Wash. App. at 225-27. *Amos* contradicts well-established double jeopardy jurisprudence from this Court and from the United States Supreme Court. To the extent that *Amos* announces a rule imposing an automatic waiver of double jeopardy protections following a guilty plea, this Court should explicitly overrule *Amos*.

In general, a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred ***prior to*** the entry of the guilty plea." *Blackledge v. Perry*, 417 U.S. 21, 29-30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (quotations and citations

omitted) (emphasis supplied). But a double jeopardy violation is not an "antecedent constitutional violation," such as, for example, an unlawful search or a *Miranda* violation. *Blackledge v. Perry*, 417 U.S. at 30. The latter types of claims, while of constitutional magnitude, do not go to "the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* Put another way, a guilty plea "simply renders irrelevant those constitutional violations ***not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.***" *Menna v. New York*, 423 U.S. 61, 63 n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam) (emphasis supplied). The nature of a double jeopardy claim, however, "is that ***the State may not convict petitioner no matter how validly his factual guilt is established.***" *Id.* (emphasis supplied).

The United States Supreme Court later clarified the holdings of *Blackledge* and *Menna* in *United States v. Broce*, 488 U.S. 563, 574-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). In *Broce*, the defendants pled guilty to two separate criminal conspiracies occurring during two different time periods over a year apart. The defendants later moved to vacate the convictions, arguing that the two agreements actually constituted parts of a single criminal conspiracy. In making this argument, the defendants sought

to introduce extra-record facts, including the findings from a separate judicial proceeding involving different defendants. *Broce*, 488 U.S. at 565-69.

The Supreme Court denied relief to the *Broce* defendants, holding that a double jeopardy claim *which is not evident from the existing record* is waived by a plea of guilty:

> ***In neither** Blackledge **nor** Menna **did the defendants seek further proceedings at which to expand the record with new evidence.*** In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered on the basis of the existing record. ***Both** Blackledge **and** Menna **could be (and ultimately were) resolved without any need to venture beyond that record.*** In *Blackledge,* the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. In *Menna,* the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sentenced so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense.
>
> ***Respondents here, in contrast, pleaded guilty to indictments that on their face described separate conspiracies. They cannot prove their claim by relying on those indictments and the existing record. Indeed, as noted earlier, they cannot prove their claim without contradicting those indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas.***

Broce, 488 U.S. at 575-76 (emphasis supplied).

In 2008, this Court—in a 9-0 decision—relied upon *Menna*, *Blackledge*, and *Broce* in reaching the opposite conclusion than that reached

by the Acting Chief Judge in this case and by Division Two in *Amos*. *State v. Knight*, 162 Wash.2d 806, 174 P.3d 1167 (2008).[2]

> A guilty plea generally insulates the defendant's conviction from collateral attack. Since the guilty plea bypasses trial, it also waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. Thus constitutional protections surrounding the determination of factual guilt are generally irrelevant because a guilty plea ensures the defendant is in fact guilty of the crime charged.
>
> However, claims which go to the very power of the State to bring the defendant into court to answer the charge brought against him are not waived by guilty pleas. The double jeopardy clause precludes the State from haling a defendant into court on a charge and is not waived by a guilty plea. ***After a guilty plea the double jeopardy violation must be clear from the record presented on appeal, or else be waived. But where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea.***

Knight, 162 Wash.2d at 811-12, citing, *inter alia*, *Menna*, *Blackledge*, and *Broce* (quotations and citations omitted) (italics in original) (bold italics supplied).[3]

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[2] The Court's decision in *Knight* pre-dated Division Two's *Amos* decision by nine months.

[3] This Court's reasoning in *Knight* is consistent with numerous holdings from other jurisdictions. *See, e.g.*, *United States v. Garcia-Venezuela*, 232 F.3d 1003, 1007 & n.2 (9th Cir. 2000) (*Broce* does not limit post-plea legal claims which do not require additional fact-finding); *United States v. Wong*, 62 F.3d 1212, 1215 n.1 (9th Cir. 1995) (guilty plea did not waive

Just two weeks ago this Court again reached the merits of a double jeopardy claim despite the fact that the defendant had entered a guilty plea. *See State v. Hughes*, ___ Wash.2d ___, ___ P.3d ___, 2009 WL 2182808 (July 23, 2009). The Court noted:

> The State did not raise the issue of whether the defendant's guilty plea precludes him from challenging his convictions on double jeopardy grounds. ***At oral argument, the State conceded that Hughes' plea did not constitute a waiver of his ability to challenge his convictions on the basis of double jeopardy. Therefore, we follow*** *State v. Knight,* ***162 Wash.2d 806, 174 P.3d 1167 (2008). In*** *Knight,* ***we held that a conviction entered pursuant to a plea agreement can be vacated when two convictions violate double jeopardy. We reasoned in part that it is not the guilty plea itself that offends double jeopardy but rather the entry of the convictions that violates double jeopardy.*** *See also State v. Martin,* 149 Wash.App. 689, 694-99, 205 P.3d 931 (2009) (court applied *Knight* and held convictions for second degree assault and attempted third degree rape entered pursuant to plea agreement violated double jeopardy because offenses are the same in law and fact. The court reasoned in part *Knight* is applicable to theories of double jeopardy other than unit of prosecution theory); *cf. State v. Amos,* 147 Wash.App. 217, 195 P.3d 564 (2008).

Hughes, ¶ 7, n. 5.

Martin, cited by this Court in *Hughes*, is a Division One case which flatly rejects Division Two's reasoning in *Amos*:

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double jeopardy claim where no evidentiary hearing was necessary to decide claim); *Thomas v. Kirby*, 44 F.3d 884, 888 (10th Cir. 1995) (double jeopardy violation apparent from existing record not waived by guilty plea); *United States v. Kaiser*, 893 F.2d 1300, 1302-03 (11th Cir. 1990) (same); *Patton v. Colorado*, 35 P.3d 124, 132 (2001) (same); *Louisiana v. Stevenson*, 998 So.2d 692, 696 (2009) (same); *Matlock v. Mississippi*, 732 So.2d 168, 170-71 (1999); *In Re Parks*, 956 A.2d 545, 551-52 (Vt. 2008) (same).

In *State v. Amos,* Division Two of this court recently held that *Knight* applies only when the double jeopardy challenge rests on the unit of prosecution theory, not the same offense theory. The court focused upon *Knight's* references to the government's power to prosecute: "[C]laims which go to 'the very power of the State to bring the defendant into court to answer the charge brought against him' are not waived by guilty pleas." Because the State may bring, and the jury may consider, multiple charges based on the same offense without violating any of the defendant's rights, but may file only one charge for each unit of prosecution, the *Amos* court reasoned that double jeopardy challenges are waived by a plea unless they derive from violation of the unit of prosecution.

We are unable to agree. The State may bring multiple charges arising from the same criminal conduct, but courts may not enter multiple convictions for the same offense without offending double jeopardy. Our review of the opinion in *Knight* disinclines us to the view that the court intended its holding to apply only to unit of prosecution claims. The court stated the issue broadly: "The single question facing the court is whether a conviction entered subsequent to a plea agreement can be vacated when that conviction violates double jeopardy." Nothing in the court's analysis was premised upon what double jeopardy theory was invoked. And under the general rule that a plea waives appeal even of constitutional violations occurring *before* the plea (unless related to the plea itself or to the power of the government to prosecute), a double jeopardy violation occurring only upon conviction, as is claimed here, is not waived.

Further, the *Knight* court's references to the power of government to prosecute are ringing echoes from celebrated cases-cases which did not explore whether there is a difference, for double jeopardy purposes, between the power to charge and the right to obtain a conviction. [citing *Menna*, *Blackledge* and *Broce*] One of those cases frames the double jeopardy issue in terms not of the State's power to prosecute but the court's power to enter the conviction or impose a sentence. [citing *Broce*] We thus do not believe these rhetorical borrowings were meant to limit the court's holding.

Martin, 149 Wash. App. at 695-97 (quotations in original) (footnotes omitted).

As *Martin* notes, the *Amos* court attempted to distinguish *Knight* by drawing a distinction between double jeopardy claims arising from "unit of prosecution" violations, and all other types of double jeopardy claims. *Amos*, 147 Wash. App. at 226-27. According to Division Two, because Amos was not advancing a "unit of prosecution" argument, "the narrow exception described in *Knight* does not apply and Amos waived his right to appeal [on double jeopardy grounds] when he entered his guilty plea to the amended information." *Id.* at 227. Of course, as discussed in *Martin*, this Court did not, either explicitly or by implication, limit the holding of *Knight* in this manner. Instead, the Court acknowledged that the double jeopardy doctrine at issue in Knight was that "which protects against multiple punishments for the same offense." *Knight*, 162 Wash.2d at 810, quoting *State v. Bobic,* 140 Wash.2d 250, 260, 996 P.2d 610 (2000).

Even if there were some legal basis for distinguishing between "unit of prosecution" claims and all other double jeopardy violations, the Acting Chief Judge in this case ignored the fact that one of Francis' claims is grounded in large part on a "unit of prosecution" theory. Francis' PRP argues that pursuant to this Court's "unit of prosecution" analysis in *State v.*

Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), he committed only one attempted robbery, and that this single attempted robbery was necessarily an element of the felony murder to which he also pled guilty. *PRP and Opening Brief*, at 26-28; *Reply Brief*, at 19-22. Thus, even if *Amos* were a correct statement of the law, Francis is still entitled to have at least one of his claims decided on the merits, which in turn should result in vacation of his attempted first degree robbery conviction.

Ultimately, the *Amos* decision—along with the Acting Chief Judge's ruling dismissing Francis' PRP—is grounded not on legitimate constitutional analysis, but on Division Two's own misguided policy concerns:

> A contrary holding [allowing the adjudication of double jeopardy challenges in guilty plea cases] would reward defendants who manipulate and mislead courts. Such a ruling would allow a defendant to mislead the court by requesting the filing of an amended information, enter a guilty plea to the amended charge and then, without withdrawing his plea, challenge the trial court's ability to hold him accountable on the charges to which he pleaded guilty. We discourage such conduct.

Amos, 147 Wash. App. at 227.

There are a number of troubling aspects to this remarkable passage. First, it should go without saying that policy considerations can not trump constitutional jurisprudence. Second, even if policy considerations had a proper place in the analysis of a double jeopardy issue, the notion that

defendants are in a position to "manipulate and mislead courts" by "requesting the filing of an amended information" reflects an astonishing ignorance of how plea negotiations actually work. In the real world plea negotiations are largely controlled by prosecutors, who—within the constraints of the evidence at their disposal—hold unilateral power in deciding whether to amend an information, and if so, what the new charges will be. Third, if there were a legitimate concern that defendants are "planting" double jeopardy issues in their guilty pleas for later tactical use (an absurd notion), the solution is not to make up constitutional rules which have no precedential foundation. Rather, the solution to such a problem—if it ever existed—would be for prosecutors to be more careful in the plea deals they draft, perhaps by negotiating an explicit waiver of double jeopardy claims as part of the original plea bargain. *See Martin*, 149 Wash. App. at 697 n. 32 ("[W]e observe that the charging decision is vested in the prosecutor, the plea requires agreement of the prosecutor, and the plea agreement can provide for waiver of any double jeopardy violations.")

The double jeopardy violations in Francis' case are evident from the existing record—the charging document, guilty plea form, and judgment. No extra-record evidence or additional fact-finding is necessary to decide his claims. Francis does not dispute the factual admissions of guilt set forth in

his guilty plea statements; indeed, he relies upon them. He does not contest that those admissions satisfy the elements of the crimes to which he pled. Nor is he "complaining of antecedent constitutional violations or of a deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Menna*, 423 U.S. at 63 n.2. Rather, Francis's claim is that the punishment imposed *after* he pled guilty—a punishment which continues to this day—was and is imposed in violation of the double jeopardy clause's protection against double punishment.

The Acting Chief Judge erred in relying on *Amos* to dismiss Francis' PRP. This Court should overrule *Amos*, reverse the Acting Chief Judge's order, and grant Francis' PRP.

Francis Is Entitled to Relief on His Double Jeopardy Claims.

There Was Only One Attempted Robbery. The Attempted Robbery Charged in Count III Was the Predicate Felony for the Charge of First Degree Felony Murder. Accordingly, the Conviction on Count III Violates Double Jeopardy and Must Be Vacated.[4]

Francis cannot be convicted of both felony murder and the predicate felony where the predicate crime is "inextricably linked" to the death. *State v. Williams*, 131 Wash. App. 488, 499-500, 128 P.3d 98, *remanded on other grounds*, 158 Wash.2d 1006 (2006) (predicate felony is an "essential

[4] Francis also wishes to direct the Court's attention to his previous briefing on this issue. *See PRP and Opening Brief*, at 24-28; *Reply Brief*, at 19-22.

element" of felony murder; attempted first degree robbery merges with felony murder unless the attempted robbery is "merely incidental" to the homicide).

Throughout these proceedings the State has argued that there were *two* attempted robberies, and that the attempted robbery which forms the predicate crime for the felony murder charge is somehow different from the attempted robbery Francis pled guilty to in count III. The State is incorrect.

The controlling authority on the unit of prosecution for robbery is this Court's decision in *State v. Tvedt,* 153 Wash.2d 705, 107 P.3d 728 (2005). *Tvedt* holds:

> ***[T]he unit of prosecution for robbery is each taking*** of personal property from a person or from his or her presence against the person's will through the use or threat of force, violence or injury to a person or property, regardless of the number of items taken. ***A single taking can result in a conviction on one count of robbery, regardless of the number of persons present.***

Tvedt, 153 Wash.2d at 708 (emphasis supplied). Multiple counts of robbery cannot be "based on a single taking of property from or from the presence of multiple persons even if each has an interest in the property." *Tvedt*, 153 Wash.2d at 720. Thus, the unit of prosecution is not a function of the number of persons present during the robbery, nor of the number of persons who are placed in fear or whose will is overcome, but of the number of "takings" which occur.

Had Francis taken property from Lucas, and also taken property from Jacobsen, then under *Tvedt* two completed robberies would have occurred. But that is not what happened. Here, there were *no* takings. Rather, in Francis' own words in pleading guilty there was but a single attempted taking of money that "Jason and D'Ann had recently gotten from her parents."

There was one, unsuccessful attempt to take money from Lucas and Jacobsen. That single attempted robbery necessarily served as the predicate crime for the first degree felony murder charged in count I. Francis' attempted robbery conviction violates double jeopardy.

The Second Degree Assault Charged in Count II and the Attempted First Degree Robbery Charged in Count III Constitute the Same Offense for Double Jeopardy Purposes.[5]

This claim is controlled by this Court's decision in *State v. Freeman*, 153 Wash.2d 765, 108 P.3d 753 (2005). Under *Freeman*, a second degree "assault committed in furtherance of a robbery merges with robbery," unless "there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *Freeman*, 153 Wash.2d at 778 (quotations omitted). However:

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[5] Francis also wishes to direct the Court's attention to his previous briefing on this issue. *See PRP and Opening Brief*, at 17-24; *Reply Brief*, at 5-19.

> [T]his exception [to the merger rule] does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime.

Freeman, 153 Wash.2d at 779 (emphasis in original).

Here, the attempted first degree robbery charged in count III accused Francis of taking a substantial step towards stealing from D'Ann Jacobsen, and in the process "inflict[ing] bodily injury upon D'Ann Jacobsen." Francis accomplished this by assaulting her "with a deadly weapon, to wit: a baseball ball," as charged in count II. Francis acknowledged the interdependence between the assault and the attempted robbery in his guilty plea form by stating:

> D'Ann Jacobsen was with [Jason Lucas] and when she screamed I swung the bat at her and hit her causing her substantial injury. I acknowledge my actions constitute a substantial step toward robbing her and Jason.

In other words, the assault on D'Ann Jacobsen, as horrifying as it was, was part and parcel of the attempted robbery charged in count III. The assault and the attempted robbery had no independent purpose or effect. Rather, the assault furthered the attempted robbery. This claim falls squarely within the

holding of *Freeman*. The lesser conviction—second degree assault—violates double jeopardy and cannot stand.

This Court Should Clarify the Appropriate Remedy When Portions of an Indivisible Plea Agreement Violate Double Jeopardy. Francis Should Either Be Allowed to Withdraw His Entire Guilty Plea, or the Convictions in Counts II and III Should Be Vacated and the Murder Count Should Be Remanded for Resentencing.

Knight appears to unequivocally hold that "vacating a conviction is the proper remedy when the conviction violates double jeopardy, even when entered pursuant to an indivisible plea agreement." *Knight*, 162 Wash.2d at 808. "A plea agreement is indivisible, and its terms must be enforced as a whole where 'a defendant pleads guilty to multiple counts or charges at the same time, in the same proceedings, and in the same document.'" *Knight*, 162 Wash.2d at 812-13, quoting *State v. Turley*, 149 Wash.2d 395, 402, 69 P.3d 338 (2003). While the Court's ostensibly broad holding would seem to dictate the remedy here, the Court in *Knight* emphasized the fact that "Knight does not seek to withdraw her guilty pleas. . . Since Knight does not seek to withdraw her plea nor does the double jeopardy clause require withdrawal of the plea, *Turley* is inapposite here." *Knight*, 162 Wash.2d at 813.

If withdrawal of the entire plea agreement were *precluded* in the case of a double jeopardy violation, Knight's desire (or lack thereof) to withdraw

her plea would be irrelevant. Accordingly, one way to read *Knight* is that when convictions entered pursuant to an indivisible plea agreement violate double jeopardy, it is not *necessary* to void the entire plea agreement in order to cure the error, but that it may be *possible* to do so if that is the remedy sought by the petitioner. *Cf. Turley*, 149 Wash.2d at 399 (defendant who is misadvised of a direct consequence of a guilty plea has the initial choice of whether to withdraw the entire plea or to enforce specific performance of the plea agreement).

Adding to the uncertainty regarding remedy, *Knight* appears to conflict with the lead opinion in this Court's earlier decision in *In Re Shale*, 160 Wash.2d 489, 158 P.3d 588 (2007). Shale pled guilty to twelve separate crimes charged under seven cause numbers as part of what the Court termed an "indivisible package deal." Shale later argued that some—but not all—of the convictions violated double jeopardy. He did not seek to withdraw his guilty pleas. *Shale*, 160 Wash.2d at 492-94. In affirming the Court of Appeals' dismissal of Shale's personal restraint petition, this Court's lead opinion concluded, "[W]e find Shale is challenging only a portion of an indivisible package deal. Therefore, we find Shale cannot challenge a portion of the plea agreement." *Shale*, 160 Wash.2d at 494. The lead opinion did not reach the merits of Shale's double jeopardy claims. *See*

Martin, 149 Wash.2d at 693-95 (discussing the conflict between *Knight* and *Shale* and concluding that *Knight* controls).[6]

There is no question that the guilty pleas entered by Francis are part of an indivisible plea agreement. Mr. Francis wishes to make it clear to this Court that if such a remedy is permissible, he seeks withdrawal of the entire indivisible plea agreement. If the Court, however, holds that vacating the offending convictions is the only remedy, then Francis requests vacation of the convictions in counts II and III and a remand for resentencing on count I.

C. CONCLUSION

This Court should reverse the order of the Court of Appeals dismissing Francis' PRP. The Court should grant the PRP and remand the case to the Pierce County Superior Court, either for vacation of the entire plea agreement, or for resentencing.

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[6] Eight justices participated in the *Shale* decision. While all eight justices concurred in the result, only four justices signed on to the lead opinion quoted in this brief. Notably, the *Knight* decision does not even mention *Shale*.

DATED this 7th day of August, 2009.

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CERTIFICATE OF SERVICE

I, Steven Witchley, certify that on August 7, 2009, I served a copy of the attached *Supplemental Brief of Petitioner* on counsel for the respondent by having it mailed, first-class, postage prepaid to:

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